Their Lordships therefore turn to the special and general conditions to discover whether the land was sold free from or subject to the property tax. The appellant (the mortgagor) relies on special condition 16, under which the property is sold subject to a mixed bag of incidents, including planning schemes, "notices, charges, Orders of Court, charging orders, caveats and court or other claims affecting the property made or served whether before on or after the date of sale".

The respondent (the purchaser) relies on general condition 6, under which the vendor is obliged to discharge "outgoings" apportioned down to the date fixed for completion. The appellant seeks to meet his submission by referring to general condition 34. It admits that the property tax, being an annual tax upon the annual value of land, is an outgoing. But it says there is a conflict between special condition 16 and general condition 6 in relation to property tax, which must be resolved pursuant to general condition 34 in favour of special condition 16.

Their Lordships do not accept this last submission. The contract must be read as a whole. Taking the special conditions and the general conditions together, their Lordships feel no difficulty in excluding from special condition 16 a charge the subject matter of which is specifically dealt with elsewhere in the contract. An outgoing is specifically dealt with by general condition 6, which places the incidence on the vendor so far as the outgoing relates to the period before the date fixed for completion. This is the normal position on the sale of land. Such an outgoing, if secured by a charge, is thus taken out of special condition 16. This construction reconciles the two clauses and avoids the illogical conclusion which would free the vendor from the burden of an outgoing if the outgoing were a charge on the property but not if it were unsecured.

Their Lordships consider that special condition 16 cannot sensibly be read at its face value. In terms it covers any "charge ... affecting the property made ... before ... or after the date of Sale". It would be absurd to suppose, for example, that the contracting parties intended that the vendor should be exonerated from a charge for money borrowed by him prior to the contract, or should be at liberty to borrow money after the date of the contract and charge the debt on the property being sold. Despite the apparent width of condition 16, it was thought necessary to deal expressly with estate duty, which is a charge under the Estate Duty Act, instead of leaving the incidence of the charge to condition 16.

Their Lordships need not express an opinion on the precise ambit of the word "charge" in special condition 16. It is sufficient to decide that the special condition does not include an outgoing the incidence of which is regulated by general condition 6, just as it would not include estate duty the incidence of which is regulated by special condition 22.

Their Lordships accordingly dismiss the appeal. The appellant must pay the respondent's costs.

Appeal dismissed.

Solicitors: *Freshfields; Coward Chance.*

CAPTAIN KAMARUL AZMAN BIN JAMALUDDIN v. LT. COL. WAN ABDUL MAJID BIN ABDULLAH & ORS.

[P.C. (Lord Fraser of Tulleybelton, Lord Scarman, Lord Brandon of Oakbrook, Lord Brightman and Sir John Megaw) January 31 & March 21, 1983]

[Privy Council Appeal No. 21 of 1981]

Armed Forces – Court Martial – Failure to comply with rules of procedure – Oath to members of court martial administered by Religious Teacher in presence of Judge-Advocate instead of by Judge-Advocate – Whether court improperly constituted – Malay Regiment Enactment, (F.M.S. Cap. 42), s. 44.

Administrative Law – Prohibition – Court Martial – Failure to comply with rules of procedure – Oath to members of court martial not administered by Judge-Advocate but by religious teacher in presence of Judge-Advocate – Whether Court martial properly constituted.

Privy Council – Practice in dealing with criminal appeals.

In this case the appellant had been brought before a general court martial, of which the respondents were members, to be tried on three charges of forgery and other forms of dishonest conduct. When the court martial was convened, the oath was administered to the president and each member of the court and to the judge-advocate by an Islamic religious teacher instead of by the judge-advocate as prescribed by the Rules of Procedure. The sole question in the appeal was whether the fact that the oath was not administered by the person prescribed in the Rules of Procedure rendered the Court Martial improperly

constituted, with the consequence that it had no jurisdiction to try the appellant. The trial judge (Harun J.) answered that question in the affirmative and made an order of prohibition, prohibiting the court martial from proceeding with hearing the charge against the appellant. The Federal Court reversed the learned judge's decision and answered the question in the negative – See [1977] 2 M.L.J. 256. The appellant appealed.

Held: (1) failure to observe the mandatory provision of the Rules of Procedure is undoubtedly a serious matter but in this case the administration of the oath by a person who was not the prescribed person was an error of procedure which did not go to the constitution of the court;

(2) in this case the failure to comply with the rules did not lead and could not reasonably be expected to lead to substantial and grave injustice being done and therefore the appeal should be dismissed.

Semble. It is essential that if any practice has developed whereby the oath is administered either to members of courts-martial or to witnesses appearing before courts-martial, by persons other than the prescribed person, the practice should either be regularised by amending the Rules of Procedure or should be discontinued at once.

Cases referred to:

(1) *Reg.* v. *Warn* [1970] A.C. 394, 402B.
(2). *In re Dillet* (1887) 12 App. Cas. 459, 467.
(3). *Muhammad Nawaz* v. *The King Emperor* (1941) L.R. 68 I.A. 126, 128.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

D. P. Vijandran for the appellant.
Nicholas Lyell Q.C. for the respondent.

Cur. Adv. Vult.

Lord Fraser of Tulleybelton (delivering the Judgment of the Board): The facts in this case are not in dispute. The appellant is an officer serving in the Malaysian army. The respondents are the members of a general court-martial before which the appellant was brought on February 16, 1976 to be tried on three charges of forgery and other forms of dishonest conduct. When the court-martial assembled, the oath was administered to the president and each member of the court and to the judge advocate. It was administered in the prescribed form and manner, and at the prescribed time. But it was administered by a full time salaried Islamic religious teacher, known as the Tuan Guru, employed by the armed forces and attached to the appellant's unit, instead of by the judge advocate as prescribed by the Rules of Procedure.. The accused and his counsel were present when the oath was administered, but they took no objection at the time to its being administered by the Tuan Guru. On the fourth day of the hearing, the appellant's counsel discharged himself and the trial was adjourned. When the trial resumed on March 1, 1976, the different counsel who then appeared on behalf of the appellant objected to the jurisdiction of the court on the ground that the court had not been properly constituted because the members had not been validly sworn in.

The sole question in the appeal is whether the fact, which is admitted, that the oath was not administered by the person prescribed in the Rules of Procedure rendered the court-martial improperly constituted, with the consequence that it had no jurisdiction to try the appellant. The trial judge (Harun J.), answered that question in the affirmative and made an order of prohibition, prohibiting the court-martial from proceeding with hearing the charge against the appellant. The Federal Court (Suffian L.P., Gill C.J. Malaya and Raja Azlan Shah F.J.) reversed the learned judge's decision and answered the question in the negative.

The statutory basis for courts-martial in Malaysia is the Malay Regiment Enactment (F.M.S. Cap. 42) ("the Enactment"). Section 44 makes general provision for convening courts-martial, and no question arises under that section. Section 44A (i) provides that the provisions of the Army Act 1955 of the United Kingdom ("the U.K. Act") specified in the Third Schedule to the Enactment shall be applicable to courts-martial convened under section 44 in Malaysia, subject to certain modifications specified in the Third Schedule none of which is material for the present purpose. Among the provisions of the U.K. Act thus made applicable in Malaysia is section 93 which is in the following terms:–

"93.–(1) An oath shall be administered to every member of a court-martial and to any person in attendance on a court-martial as judge advocate, officer under instruction, shorthand writer or interpreter.

(2) Every witness before a court-martial shall be examined on oath: Provided ... [there follows a provision relating to children called as witnesses].

(3) An oath required to be administered under this section shall be in the prescribed form and shall be administered at the prescribed time by the prescribed person and in the prescribed manner."

"Prescribed" means provided for by Rules of Procedure – see the U.K. Act 1955 section 103(2)(m).

The relevant Rules of Procedure are Rules 28, 29 and 34 which are as follows:–

"28. – (1) Immediately after Rule 27 has been complied

with, an oath shall be administered to the president and each member of the court in accordance with Rule 34 and in the presence of the accused.

(2) *If there is a judge advocate, the oath shall be administered by him to the president first and afterwards to each member of the court.* If there is no judge advocate, the oath shall be first administered by the president to the members of the court and then to the president by any member of the court already sworn. (Emphasis added).

29. After the court have been sworn, an oath shall be administered to the judge advocate (if any) in accordance with Rule 34 and in the presence of the accused.

34. – (1) An oath which is required to be administered under these Rules shall be administered in the appropriate form and in the manner set out in the Sixth Schedule to these rules:

Provided that:–

(a) if any person desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland he shall be permitted to do so;

(b) The opening words of the oath may be varied to such words and the oath may be administered in such manner as the person taking the oath declares to be binding on his conscience in accordance with his religious beliefs.

(2) Subject to Rule 28(2) every oath shall be administered at a court-martial by the president, a member of the court or the judge advocate."

The terms of Rule 28(2) are perfectly clear and unambiguous. In this case, where there was a judge advocate, the Rule requires that the oath "shall" be administered by him. That provision is reinforced by section 93(3) of the U.K. Act which provides that an oath "shall" be administered "by the prescribed person". These are, no doubt, procedural provisions, but their Lordships have no doubt that they are mandatory and not merely directory. If authority be required to support that view, it is to be found in *Reg.* v. *Warn*[1] (also a court-martial case) where Lord Hodson said this:– "Procedural sections are usually mandatory and there is nothing which points to the contrary in this case".

Failure to observe such a mandatory provision is undoubtedly a serious matter and their Lordships have carefully considered whether it resulted in the court-martial's not being properly constituted. The requirements for the constitution of a general court-martial are laid down in detail in the U.K. Act and the Rules of Procedure. Sections 87, 90 and 92 of the U.K. Act (all of which are applied to Malaysia by Schedule 3 of the Enactment) are relevant for this purpose. Section 87 provides that a general court-martial shall consist of the president and not less than four other officers, and it makes provision as to the rank of the officers qualified to be president and members, and as to the method of appointing them. Section 90 makes certain supplementary provisions as to the constitution of the court. Section 92 provides that the accused shall be entitled to object on any reasonable grounds to any member of the court. All these requirements are reflected in the Rules of Procedure. Rules 26(1) provides that:–

"(1) Upon a court-martial assembling, the court shall, before beginning the trial, satisfy themselves in closed court:–

(a) that the court has been convened in accordance with the Act and these Rules;"

and it details various particular matters specified in the Act and the Rules upon which the court are to satisfy themselves. Sub-rules (2) and (3) provide for what is to be done in cases where the court is not satisfied on any of the matters specified. Sub-rule (4) provides:–

"(4) When the court has complied with this Rule and is ready to proceed with the trial, the president shall open the court and the trial shall begin."

Sub-rule (4) is particularly important for the present purpose because it shows in the opinion of their Lordships that when the earlier parts of Rule 26 have been complied with the court is properly constituted in all formal respects. In the present case it is not suggested that Rule 26 was not complied with. The only remaining matter before the constitution of the court is complete is the accused's right to object to any of its members. That is dealt with by Rule 27(1) which provides that :–

"The order convening the court and the names of the officers appointed to try the accused shall be read in the hearing of the accused who shall be given an opportunity to object to any of these officers in accordance with section 92 of the Act."

In the present case it appears that the accused did not exercise his right of objection. Their Lordships are of opinion that when Rules 26 and 27 have both been complied with, the court is properly constituted and that, when the court is thereafter sworn in accordance with Rule 28 ("immediately after Rule 27 has been complied with ...") the swearing is part of the proceedings of a court already constituted, and not one of the stages in its constitution.

Their Lordships are accordingly of opinion that the administration of the oath by a person who was not the prescribed person was an error

of procedure which did not go to the constitution of the court. It, therefore, becomes material to consider whether it led, or might reasonably be expected to lead, to substantial and grave injustice being done. Counsel for the appellant submitted that injustice might be done because it was necessary for the person administering the oath to be familiar with the provisions of Rule 34 and of Schedule 6 to the Rules of Procedure as to the correct manner of administering the oath to persons of various religious beliefs and as to affirmation. Their Lordships do not accept this submission because the oath must be, and was in this case, administered in the presence of the judge advocate and of the members of the court. It would be the duty of the judge advocate or the president to be familiar with the rules in Schedule 6 and to direct the Tuan Guru or other person who actually administered the oath to comply with these rules. In any event the oath was administered in the proper form in this case.

The only injustice which could reasonably be suggested is that the members of the court, or at least those members if any who were not Muslims, might not feel bound in their consciences by the oath administered by the Tuan Guru. This suggestion was made (quite properly) in argument as a hypothetical possibility, but it has not been alleged as a fact that any member of the court in this case did not feel bound in his conscience by the oath. Their Lordships are of opinion that, in the absence of specific averments to that effect, the possibility is too remote to require to be taken into account. The members of the court were all officers of the Malaysian services. Their Lordships do not believe that any of them, whether Muslims or not, would be guilty of such a cynical disregard of his duty (both moral and military) as to go through the form of solemnly taking the oath with a mental reservation that he was free to disregard it. Their Lordships recognise that in Malaysia, where various religious and ethnic communities live side by side, there may be special reason to avoid even the appearance of administering an oath which might not be felt to be binding by the person swearing, and also to avoid any appearance of imposing a practice suitable for one community on members of another community. But the Federal Court, whose members are much more familiar with the local conditions than their Lordships are, evidently did not consider it likely either that a non-Muslim would feel free from obligation under an oath administered by a Tuan Guru, or that members of the public would suppose that he might do so. In these circumstances, their Lordships consider that the words of Lord Watson in *In re Dillet*[2] apply here. Lord Watson, referring to the practice of this Board in dealing with criminal appeals, said:—

> "The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

Those words were quoted with approval by Viscount Simon L.C. delivering the judgment of the Board in *Muhammad Nawaz* v. *The King Emperor.* In the present case there has been "a disregard of the forms of legal process" but it has not led to "substantial and grave injustice" being done.

It appears that the oath was administered by the Tuan Guru to some, if not all, of the witnesses whose evidence was heard before the appellant's original counsel withdrew from the case, but that error of procedure was not founded on in the submissions on behalf of the appellant. Clearly it could not go to the jurisdiction of the court and it need not now be considered.

A submission was made to the trial judge on behalf of the respondents to the effect that the administration of the oath by the Tuan Guru might be justified as being in accordance with the custom of the service. This submission was rejected by the learned judge and was apparently not renewed before the Federal Court. It was not made to their Lordships' Board and does not, therefore, call for any decision, but their Lordships think it right to mention the matter. The submission before the trial judge was based on section 110 of the Malay Regiment Enactment which provides:—

> "Any power or jurisdiction given to, and act or thing to be done by, or before any person holding any military office may be exercised by, or done by, to, or before any other person for the time being authorised in that behalf according to the custom of the service, or according to Rules made under section 52 of this Enactment."

There was some evidence in affidavits which were before the trial judge of the existence of a custom of the service whereby the oath at courts-martial is administered by a Tuan Guru. Their Lordships are inclined to agree with the view expressed by the learned trial judge to the effect that section 110 does not authorise material alteration of the written rules of procedure by some unwritten

custom of the service which could not appropriately be applicable to persons of all religious groups, but only to Muslims.

While their Lordships, for the reasons indicated above, have reached the same conclusion as the Federal Court, they consider that the Federal Court might well have expressed themselves more strongly than they did, near the end of their judgment, when they said "it is hoped" that the oath will be administered in future by the judge advocate personally. In their Lordships' view it is essential that, if any practice has developed whereby the oath is administered, either to members of courts-martial or to witnesses appearing before courts-martial, by persons other than the prescribed person, the practice should either be regularised by amending the Rules of Procedure or should be discontinued at once.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal be dismissed. There will be no order as to the costs of the appeal to this Board.

Appeal dismissed.

Solicitors: *Bartletts, de Reya; Stephenson Harwood.*

KIM GUAN & CO. SDN. BHD. v. YONG NYEE FAN & SONS SDN. BHD.

[P.C. (Lord Fraser of Tulleybelton, Lord Scarman, Lord Brandon of Oakbrook, Lord Brightman and Sir John Megaw) February 1 & March 21, 1983]

[Privy Council Appeal No. 32 of 1980]

Practice and procedure – Appeal – Question of fact – Whether appeal court entitled to reverse decision of trial judge on question of fact – Oral testimony inconsistent with circumstantial documentary evidence – Oral testimony accepted by trial judge – Whether finding of trial judge could be reversed.

In this case the question of fact was whether the purchaser of shop premises or his family company (the respondent) in whose name the purchase was taken became the beneficial owner thereof in accordance with the ostensible title; or whether the purchaser constituted himself or his family company a trustee for the benefit of himself and his two business associates and the trading company (the appellant) which was formed to take over his business activities. The purchaser died five years after the purchase was made. Thirteen years later the younger of the two surviving business associates, who or whose family had come to own the trading company, claimed that a trust had been created at the time of the purchase. They gave evidence to the trial judge of an orally constituted trust. The evidence was totally inconsistent with the documentary evidence of a circumstantial nature extending over much of the intervening period. There was no suggestion that the documentary evidence was in any way fabricated or falsified. The trial judge accepted the oral testimony of the two surviving business associates despite its inconsistency with the circumstantial evidence. The Federal Court, although conscious of the difficulty and unwisdom of reversing a trial judge on a matter of fact deposed to by witnesses whom the trial judge had seen and heard nevertheless considered that such a course was in the circumstances proper to be taken – See [1979] 1 M.L.J. 182.

The appellant appealed.

Held: on the facts of the case and in the light of the documentary evidence it is impossible to support the conclusion reached by the trial judge. The Federal Court, which lost no advantage because it did not see and hear the witnesses, was fully justified in reversing and indeed was bound to reverse the trial judge.

Case referred to:

(1) *Watt or Thomas* v. *Thomas* [1947] A.C. 484, 487.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Dennis Levy Q.C. (*Thomas Jock Craven* with him) for the appellant.

Robert Walker Q.C. (*Jonathan Harvie* with him) for the respondent.

Cur. Adv. Vult.

Lord Brightman (delivering the Judgment of the Board): The issue on this appeal is whether the Federal Court of Malaysia was entitled to reverse the decision of the trial judge on a question of fact, thereby rejecting the evidence of two witnesses who were accepted by the trial judge as witnesses of truth. The question of fact was whether the purchaser of shop premises in 1954 (to be more precise, his family company in whose name the purchase was taken) became the beneficial owner thereof in accordance with the ostensible title; or whether the purchaser constituted himself or his family company a trustee for the benefit of himself and his two business associates and the trading company which was found to take over their business activities. The purchaser died five years after the purchase was made. 13 years later the younger of the two surviving business associates, who or whose family had come to own the trading company, with the assistance of the evidence of his former partner, claimed that a trust had been